

## FEDERAL CIRCUIT COURT OF AUSTRALIA

*SINGH v MINISTER FOR IMMIGRATION &  
ANOR*

[2016] FCCA 407

### Catchwords:

MIGRATION – Review of a decision by the Migration Review Tribunal – application for a Partner (Temporary) (Class UK) visa – application made out of time – extension of time application – inadequate explanation for delay – application for extension of time dismissed.

### Legislation:

*Marriage Act 1961* (Cth)

*Migration Act 1958* (Cth), ss.5F, 65, 360A, 362B, 379G, 477, 477(2)

*Migration Regulations 1994* (Cth), reg. 1.15A, Sch 2: cls.820.211, 820.211(2), Part 820.

### Cases cited:

*Kaur v the Minister for Immigration and Border Protection* (2014) FCA 915

*Minister for Immigration and Multicultural and Indigenous Affairs v Jia*

*Legeng* (2001) 205 CLR 507

|                          |                                                             |
|--------------------------|-------------------------------------------------------------|
| Applicant:               | JATINDER SINGH                                              |
| First Respondent:        | MINISTER FOR IMMIGRATION &<br>BORDER PROTECTION             |
| Second Respondent:       | ADMINISTRATIVE APPEALS<br>TRIBUNAL                          |
| File Number:             | MLG 2314 of 2014                                            |
| Judgment of:             | Judge Hartnett                                              |
| Hearing date:            | 10 February 2016                                            |
| Date of Last Submission: | Leave to file further written submissions<br>within 14 days |
| Delivered at:            | Melbourne                                                   |

Delivered on: 1 March 2016

## **REPRESENTATION**

The Applicant: In Person

Counsel for the Respondents: Mr Wood

Solicitors for the Respondents: DLA Piper Australia

## **ORDERS**

- (1) The name of the Second Respondent be changed to the Administrative Appeals Tribunal.
- (2) The Application filed on 17 November 2014 for an order under s.477(2) of the *Migration Act 1958* (Cth) is dismissed.
- (3) The Applicant pay the costs of the First Respondent fixed in the sum of \$6,825.

# **FEDERAL CIRCUIT COURT**

## **OF AUSTRALIA**

### **AT MELBOURNE**

**MLG 2314 of 2014**

**JATINDER SINGH**

Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**

First Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**

Second Respondent

## **REASONS FOR JUDGMENT**

1. On 17 November 2014, the Applicant applied for an order under s.477(2) of the *Migration Act 1958* (Cth) ('the Act') for an extension of time within which to apply for judicial review of a decision of the Migration Review Tribunal (as it then was) ('the Tribunal') on the basis of alleged jurisdictional error attending the decision. The Tribunal decision was dated 26 August 2014. The Applicant was required to file his application for judicial review by 30 September 2014. There was thus an approximate seven week delay in the filing of the application.
2. Section 477 of the Act is as follows:-

*“(1) An application to the Federal Circuit Court for a remedy to be granted in exercise of the court’s original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.*

*(2) The Federal Circuit Court may, by order, extend that 35 day period as the Federal Circuit Court considers appropriate if:*

*(a) an application for that order has been made in writing to the Federal Circuit Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and*

*(b) the Federal Circuit Court is satisfied that it is necessary in the interests of the administration of justice to make the order.”*

3. The Applicant’s grounds for seeking an extension of time, as set out in the application are:-

*“1. I was not Advised of the date and time of the Refusal of my Partner visa application.*

*2. I was not made Aware that my application has merits (sic) in getting my filed Reviewed through the court.”*

4. The Applicant’s grounds of judicial review as set out in the application are as follows:-

*“1. the tribunal made an error by limiting the ways a family operator (sic) thereby making an incorrect decision.*

*2. I was never provided an opportunity to Present my case to the Tribunal and there for (sic) Arriving at a biased DECISION.”*

5. The application is supported by an affidavit sworn by the Applicant on 17 November 2014. That affidavit annexes the Tribunal’s Statement of Decision and Reasons dated 26 August 2014. The Applicant states in the body of the affidavit:-

*“1. That I donot (sic) agree with the decision of the tribunal As it MADE an error in considering the way families operate.*

*2. that the tribunal did not consider my case fully and only considered parts of my case in making a decision.”*

6. The response of the First Respondent is dated 5 December 2014. It opposes the making of the orders sought in the Applicant's application and seeks costs upon dismissal of the application. The response document, in response to the application for an extension of time, sets out relevantly the following:-

“ ...

*3. The applicant's explanation for the delay is unclear. The first respondent contends that the delay has not been satisfactorily explained. To the extent that the applicant is asserting that he was not advised of his review rights, the first respondent contends that it was the responsibility of the applicant to ascertain his review rights and any applicable time limits.*

*4. The substantive application pleads two grounds. The first takes issue with the merits of the MRT's conclusions. The second alleges that the applicant was not provided with an opportunity to present his case and that the MRT was accordingly biased. The first respondent notes that it is apparent from the MRT decision record that the applicant was invited to appear before the MRT and failed to do so. The first respondent contends that in those circumstances this ground cannot be made out.*

*5. The first respondent opposes the grant of an extension of time on the basis that it is not necessary in the interests of the administration of justice, having regard to the delay, the explanation provided for the delay, and the merit of the substantive application.”*

7. The First Respondent relies further upon an affidavit affirmed on 29 January 2016 by Ms Chloe Ann Hillary, solicitor for the First Respondent, and the First Respondent's Outline of Submissions filed on 2 February 2016. The Court notes no written submissions were filed by the Applicant despite Orders made by Registrar Allaway on 18 February 2015 requiring such submissions.

## **Consideration**

8. The Tribunal had before it an application for review of a decision of a delegate of the Minister for Immigration and Border Protection, of 2 April 2013, refusing to grant the Applicant a Partner (Temporary) (Class UK) (Subclass 820) visa under s.65 of the Act ('the visa').
9. The Applicant at the time of the Tribunal decision was a 30 year old citizen of India. He applied for the visa on 24 June 2011, on the basis of his relationship with his sponsor, Ms Marie Dallas Taituave, Australian citizen. At that time, being the time of the Applicant's visa application, sch.1 to the *Migration Regulations 1994* (Cth) ('the

Regulations') prescribed Partner (Temporary) (Class UK) visas as a class of visa and (Subclass 820) as the sole subclass. The criteria for the grant of this visa was set out in Part 820 of sch.2 to the Regulations. Schedule 2 prescribed certain "time of application" and "time of decision" criteria for the grant of a Subclass 820 visa.

10. The delegate refused to grant the visa on the basis that the visa Applicant did not satisfy cl.820.211(2) because the delegate was not satisfied that Mr Singh was in a genuine and continuing spousal relationship with the sponsor.
11. On 16 July 2014 the Tribunal wrote to the Applicant advising the Applicant that it had considered all the material before it relating to his application, but was unable to make a favourable decision on that information alone. The Tribunal invited the Applicant to give oral evidence and present arguments at a hearing on 20 August 2014. The hearing invitation complied with the requirements of s.360A of the Act.
12. The invitation to appear before the Tribunal was forwarded to the authorised recipient of the Applicant by correspondence of 16 July 2014. The invitation noted that a Punjabi interpreter had been arranged for the hearing on 20 August 2014. The Tribunal requested that any additional documents or information that the Applicant wished to rely on during the hearing be provided to the Tribunal by 13 August 2014. Additionally the correspondence contained the following relevant request:-

*"The Tribunal may wish to take evidence from Marie Taituave. Please arrange for Marie Taituave to attend the hearing."*<sup>1</sup>

13. The affidavit of Ms Hillary, filed on behalf of the First Respondent, contains evidence which establishes that the invitation to appear before the Tribunal, as contained in correspondence from the Tribunal of 16 July 2014, was dispatched to the Applicant's authorised recipient on 16 July 2014 (by post). This is consistent with the Tribunal's obligation under s.379G of the Act. In addition to the letter of 16 July 2014, the Tribunal had by letter of 18 April 2013 acknowledged the Applicant's application for review, and in that acknowledgement indicated to the Applicant that if he wished to provide material or written arguments for

<sup>1</sup> Letter from Migration Review Tribunal to Mr Singh dated 16 July 2014.

the Tribunal to consider, he should do so as soon as possible. The Applicant did not avail himself of that opportunity.

14. The Applicant asserts that he did not receive the invitation to appear before the Tribunal. That is irrelevant in these circumstances. However the Court finds he did receive such invitation. The Court prefers the evidence of the First Respondent as to the Tribunal's postal dispatch of the invitation, which included the postal dispatch registrar indicating that the invitation to appear was indeed posted to the Applicant's authorised recipient on 16 July 2014. Further, the Applicant's own 'Request for Ministerial Intervention' in correspondence of 20 September 2014, sent by him from his address at 3/29 Lightwood Road Springvale, in the State of Victoria, to Mr Scott Morrison, Minister for Immigration and Citizenship (as the Treasurer then was), clearly indicates that the Applicant received the invitation to the Tribunal hearing of 16 July 2014 as set out in paragraph 4 of that correspondence. The Applicant said in paragraph 5 of that same correspondence:-

*"I could not reply and attend hearing to the Tribunal because of my circumstances due to the shocking news of the sudden demise of my partner Marie Dallas while she was away to New Zealand visit. It left me devastating, shattered and depressed."*<sup>2</sup>

15. As the Applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear, and the Tribunal was satisfied that the hearing invitation complied with the requirements of s.360A of the Act, the Tribunal determined to make its decision pursuant to s.362B of the Act without taking any further action to enable the Applicant to appear before it.
16. On 26 August 2014, the Tribunal notified the Applicant's authorised recipient that the Tribunal had made a decision in relation to the application for review and had determined to affirm the decision under review. A copy of the Tribunal's Statement of Decision and Reasons ('the Decision Record') and a fact sheet were enclosed with the correspondence. That fact sheet was headed "Information About Tribunal Decisions (M25)" and noted relevantly that the Applicant could apply to the Court for judicial review of the Tribunal decision,

<sup>2</sup> Letter from Jatinder Singh to Mr Scott Morrison dated 20 September 2014.



and that if he wished to apply for review, he must do so within 35 days of the date of the Tribunal decision. Further, that if the Applicant required an extension of time, he must ask for it in the application and explain why.

17. Although the application for judicial review does not raise the issue, the Minister nevertheless put before the Court a submission that it was not unreasonable for the Tribunal to exercise its discretion under s.362B of the Act to make a decision on the review without taking any further action to allow or enable the Applicant to appear before it. I accept that submission. The Tribunal had no material before it as filed by the Applicant in support of his application to the Tribunal and no evidence that at the time it made its decision, the Applicant's sponsor had died in New Zealand. The only reference to that was the Applicant providing that circumstance as an explanation in his 'Request for Ministerial Intervention' after the making of the Tribunal decision.
18. When looking to the history of the matter and in particular the history of contact between the Applicant and the Tribunal, and as Counsel for the First Respondent submits, this is not a case similar to *Kaur v the Minister for Immigration and Border Protection* (2014) FCA 915, where the Tribunal "ought to have realised the failure [of the applicant] to file a response to the hearing invitation, and the non-appearance at the ... hearing, were out of character, and departed from the pattern of conduct of the [applicant] in terms of [his] attitude to the review."<sup>3</sup> In this case the Applicant provided no material in accordance with the Tribunal's request and no further evidence at all.

## **Tribunal's consideration of claims and evidence**

19. The Tribunal correctly set out the applicable law. It referred to cls.820.211(2) and 820.211 of sch.2 to the Regulations, which required that at the time the visa application was made, and at the time of the Tribunal decision, the Applicant was the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The Tribunal noted in the case before it the

<sup>3</sup>*Kaur v the Minister for Immigration and Border Protection* (2014) FCA 915.

Applicant claimed to be the spouse of the sponsor, who was an Australian citizen.

20. The Tribunal considered the definition of “spouse” as set out in s.5F of the Act. It relevantly provided:-

*“(1) For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a married relationship if:*

*(a) they are married to each other under a marriage that is valid for the purposes of this Act; and*

*(b) they have a mutual commitment to a shared life as a husband and wife to the exclusion of all others; and*

*(c) the relationship between them is genuine and continuing; and*

*(d) they:*

*(i) live together; or*

*(ii) do not live separately and apart on a permanent basis.*

*(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.”*

21. The Tribunal noted that in forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship, as set out in reg.1.15A of the Regulations. That Regulation was attached (by way of extract from the Regulations) to the decision. It provided as follows:-

*“(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.*

*(2) If the Minister is considering an application for:*

- (a) a Partner (Migrant) (Class BC) visa; or*
- (b) a Partner (Provisional) (Class UF) visa; or*
- (c) a Partner (Residence) (Class BS) visa; or*
- (d) a Partner (Temporary) (Class UK) visa;*

*the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).*

*(3) The matters for subregulation (2) are:*

*(a) the financial aspects of the relationship, including:*

*(i) any joint ownership of real estate or other major assets; and*

*(ii) any joint liabilities; and*

*(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*

*(iv) whether one person in the relationship owes any legal obligation in respect of the other; and*

*(v) the basis of any sharing of day-to-day household expenses; and*

*(b) the nature of the household, including:*

*(i) any joint responsibility for the care and support of children; and*

*(ii) the living arrangements of the persons; and*

*(iii) any sharing of the responsibility for housework; and*

*(c) the social aspects of the relationship, including:*

*(i) whether the persons represent themselves to other people as being married to each other; and*

*(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*

*(iii) any basis on which the persons plan and undertake joint social activities; and*

*(d) the nature of the persons' commitment to each other, including:*

*(i) the duration of the relationship; and*

*(ii) the length of time during which the persons have lived together; and*

*(iii) the degree of companionship and emotional support that the persons draw from each other; and*

*(iv) whether the persons see the relationship as a long-term one.*

*(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."*

22. On the basis of a Certificate of Marriage issued by the Commonwealth of Australia, the Tribunal was satisfied that the Applicant and his sponsor married on 15 June 2011. The Tribunal noted that the Applicant had provided a copy of a divorce order which stated that he and one Mandeep Kaur were divorced on 7 May 2011. There was no evidence before the Tribunal to raise any issue as to the validity of the marriage for the purposes of the *Marriage Act 1961* (Cth).

23. The Tribunal said at paragraph 14 of its Decision Record the following:-

*"Without the opportunity to explore his circumstances at a hearing, the Tribunal is unable to be satisfied on the evidence before it that Mr Singh and Ms Taituave were in a spousal relationship at the time of application or that they remain in a spousal relationship at the time of this decision. The Tribunal would have wished to have further information from the review applicant in relation to the above matters."*

24. In particular, the Tribunal reasoned as follows and as accurately set out in paragraph 14 of the First Respondent's Outline of Submissions:-

*"14.1. Financial aspects: The Tribunal observed that there was limited evidence of the financial aspects of the relationships at the*

*critical times (time of application on 24 June 2011, and time of decision on 26 August 2014). There was only joint bank statements for periods in 2012, and a tenancy agreement for a period in 2011. The noted (sic), but gave little weight, to receipts in joint names from Retravisio for purchases in 2011 and 2012. “In the absence of evidence of shared financial arrangements at the time of application or time of decision, the Tribunal is not satisfied that the parties pool their resources or make joint financial decisions in a manner consistent with being in a married relationship.”*

*14.2. Nature of household: The Tribunal referred again to the bank statements for periods in 2012, and the tenancy agreement in 2011. However, the Tribunal observed that “[t]here is no evidence before the Tribunal that the parties shared a household at the time of application or that they currently share a household.”*

*14.3. Social aspects: The Tribunal referred to photographs of the applicant’s and sponsor’s wedding in 2011, and interactions with other people in a social setting, and the statutory declarations provided by two other persons in 2012 about the relationship. However, the Tribunal observed that there was no evidence that at the time of the decision in 2014 that the applicant and the sponsor “present themselves to family and friends as being in a married relationship or that they are regarded by others as being in a married relationship”. Accordingly, the Tribunal was not satisfied that at the time of the decision the parties “share social activities in a manner consistent with being in a married relationship”.*

*14.4. Nature of commitment: The Tribunal observed that “[t]here is little evidence before the Tribunal about the development of the relationship between the parties, their current circumstances or their future plans for the future”. Accordingly, the Tribunal stated that it was “unable to establish whether they were committed to a genuine and continuing relationship at the time of application or whether they are committed at the time of decision”.<sup>4</sup>*

25. The Tribunal determined that the Applicant did not satisfy the criteria for the grant of the visa and affirmed the decision not to grant the Applicant a Partner (Temporary)(Class UK) visa.
26. The Applicant’s first ground of review is really the seeking of merits review. The Tribunal applied the relevant legislation, did so accurately

<sup>4</sup> First Respondent’s Outline of Submissions filed on 2 February 2016 at [14.1] - [14.4].

and made findings open to it on the materials and evidence before it. No jurisdictional error could be said to arise on this ground.

27. Likewise, ground 2 of the Applicant's application asserting judicial review could not be made out. It is clear on the evidence that the Applicant appointed a representative, Mr Ravinder Pal Singh, to act on his behalf and to be his authorised recipient. He was provided with every opportunity to present his case to the Tribunal.
28. No suggestion that the Tribunal's decision is affected by bias is supported on the evidence. That is a serious allegation and must be "firmly established" or "clearly proved" by the evidence.<sup>5</sup>

## **Prejudice and Delay**

29. Counsel for the First Respondent concedes there is no prejudice to the First Respondent in an extension of time being granted. Counsel does, however, press that the Applicant's affidavit does not explain satisfactorily the reasons for the Applicant's delay in filing an application for judicial review. The 'Request for Ministerial intervention' correspondence emanating from the Applicant and as contained in the evidence in the court book, which is relied upon in these proceedings, casts doubt on the Applicant's contention that he was not advised of the date and time of the refusal of his partner visa application. The Court finds that the Applicant was so advised within the 35-day time limit for the bringing of an application, because of the correspondence (as referred to in paragraph 14 of these reasons) forwarded by him on 20 September 2014, and as confirmed by him in the oral hearing of his judicial review application before the Court.

## **Conclusion**

30. The Court concludes that there is no arguable case that jurisdictional error could be established on the part of the Tribunal in the facts of this case. Additionally, the Court has not a satisfactory explanation from the Applicant as to the delay in the filing of his application. The Court is, on a consideration of these matters, not satisfied that it is necessary

<sup>5</sup>*Minister for Immigration and Multicultural and Indigenous Affairs v Jia Legeng* (2001) 205 CLR 507 at 531 (69) Gleeson and Gummow JJ.

in the interests of the administration of justice to make the order as sought by the Applicant pursuant to s.477(2) of the Act.

31. Costs shall follow.

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**I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Hartnett**

Date: 1 March 2016